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Mr. Lyndon Rowe
Chairman
Economic Regulation Authority
GPO Box 8469
Perth Business Centre
PERTH WA 6849

**PUBLIC SUBMISSION ON REVIEW OF THE WESTERN AUSTRALIAN RAILWAYS (ACCESS) CODE
2000 DRAFT REPORT 1 JULY 2005**

Dear Mr. Rowe,

Alcoa has reviewed the Draft Report "Review of the Western Australian Railways (Access) Code (2000) dated 1 July 2005 and submits the following comments on the preliminary views expressed in that report and the recommendations being proposed.

It is our view that the Code has not lived up to expectations and although it is still too early to fully assess its ability to regulate the monopoly provider, our experience to date suggests that several approaches taken by the Authority and further reiterated in the recommendations in this Draft Report do not suggest that the Code will develop into a strong and effective regime designed to foster competitive access to a monopoly controlled asset.

We consider that the Authority has yet to prove that the Code is effective in delivering the efficiency objective of the CPA. Unless the Authority takes a more proactive role in promoting the Code, improving its applicability and recognises its role to assist applicants through the process, then the Code will not provide a sound basis for third party access in WA.

To date, the Authority has adopted a 'hands off' approach to tackling many of the key issues for users and this may lead to the Code being ineffective in the future unless some key issues are addressed.

It is yet to be established that the Code (and the Act) provide the necessary legislative framework to give third party operators access to track and other key infrastructure in order to deliver competitive rates to end users. Had a vertically separated structure been implemented at the time of the sale of Westrail, it may well have delivered a better outcome than the current structure. Alcoa has shown through its earlier tender process that there are real impediments to the introduction of another major above rail operator and the decision to exclude key terminals and depots from the Code only compounds this issue.

We are also concerned with the wording now being used in the Draft Report regarding “restart” of negotiations¹ if negotiations commence outside the Code. For example, does this “restart” wording apply to Alcoa’s Proposal for Access to WNR made in accordance with Part 2 section 8 of the Code in September 2001 ? The Authority needs to make its views very clear on how existing ‘ex-Westrail’ users should commence negotiations when their contracts are due to expire. If the Authority considers that the current legislation or regulations restrict its ability to recognise agreements currently being negotiated under the Code (including Alcoa’s application) then it should clearly state this and propose any necessary changes in this Draft Report.

Given that it will be another five years before the next review, the Authority needs to resolve any outstanding issues during this current review process or alternatively be prepared to recommend another review before the five yearly review.

Response to Preliminary View 1

It is Alcoa’s view that a Standard Access Agreement should be approved by the Authority to provide a better starting point for negotiations. Alcoa spent many hours rewording unacceptable clauses in the draft agreement supplied by WNR at the commencement of negotiations.

Response to Preliminary View 2

Alcoa strongly opposes the Authority’s view on the usefulness of the Overpayment Rules to address the issue of excess revenue acquired by the railway owner as a result of contributed assets. In August 2002, Alcoa submitted a public submission on the “Draft Determination of the Overpayment Rules to Apply to WestNet Rail”. Alcoa maintains its view as stated in that submission. Alcoa agrees that the overpayments formula is fundamentally correct in that each operator receives a percentage of the overpayment in proportion to their original contributions to revenue but specifically disagrees with the use of this formula over a selected operator’s route rather than by route section. Given subsequent statements that users are achieving access rates which result in revenue streams below the ceiling, it should be evident that the Overpayment Rules cannot resolve this issue in isolation.

Further, on the Authority’s own admission, it cannot enforce return of overpayments to non-Code users reinforcing the argument that these users will not be treated equitably on contributed assets.

Response to Recommendation 1

Part 2 amendment

The Authority has not adequately explained the reasoning behind the requirements to amend Part 2 of the Code. If the amendment required is designed to clarify the existing process (rather than changing it) then we would support this amendment. In submitting a Proposal for Access in September 2001, we found the requirements in the Code to be well documented. It would be helpful if the Authority provided a copy of the amendments or summary on the intent with this recommendation in the Final Report.

Part 5 instruments

It is Alcoa’s view that access to the network must be provided on an equitable basis especially where the track owner through its association with its partner above rail operator controls all movements on the network. Alcoa is keen to see another intrastate operator providing significant volume on the network and does not agree that WNR should have any discretion with regard to the application of the TPP and TMG. The TPP and the TMG must be applied equally to all operators irrespective of whether they are inside or outside the Code. To suggest otherwise would only encourage a vertically integrated provider to manipulate paths or guidelines to the advantage of its partner above rail or non-Code users.

The Authority must propose a recommended change to the Code (or the Act) if it believes that it cannot exercise control over the application of the TPP and the TMG to agreements made outside the Code.

¹Draft Report section E4 p iii and section 2.3 p9

Response to Recommendation 2

No further comment.

Response to Recommendation 3

No further comment.

Response to Recommendation 4

Alcoa supports this recommendation.

Response to Recommendation 5

This recommendation needs further explanation. Cost sharing between users will require clarification of the Authority's approach to 'contributed assets'. Based on the Authority's current view expressed in Preliminary View 2, that these can be adequately resolved by the Overpayment Rules (a view which is not shared by Alcoa), we do not see how network expansions can be equitably shared between all users.

If all future expansions are funded by the railway owner then this recommendation, once detailed, may work but if the railway owner continues to seek funding for expansions particularly on the terms expressed in their submission (contract life versus useful life)² then it seems that the Authority needs to make it clear how it intends to consider user funded expansions before revising section 9(2)(b)(ii) of the Code. Alcoa seeks further clarification of the Authority's intent in this recommendation.

We submit these additional comments on the Draft Report for consideration prior to the release of a final report on the review of the Code. If you require any further information or clarification of any of the points raised in this submission please feel free to contact me.

Yours faithfully

John Oliver
Transportation & Logistics Manager
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² As quoted in the Draft Report section 4.4.2 p26